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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 547.

STATE OF ALABAMA,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENT IN OPPOSITION.

SAMUEL M. JOHNSTON,
P. O. Box 550,
Mobile 4, Alabama,
JOS. F. JOHNSTON,
E. T. BROWN, JR.,
902 First National Building,
Birmingham 3, Alabama,
Counsel for Respondent.

JOHNSTON, McCALL & JOHNSTON,
P. O. Box 550,
Mobile 4, Alabama,
CABANISS & JOHNSTON,
902 First National Building,
Birmingham 3, Alabama,
Of Counsel.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, Transcontinental Gas Pipe Line Corporation, respectfully says that the petition for writ of certiorari should be denied.

SUMMARY STATEMENT OF REASONS FOR DENIAL OF THE WRIT.

This case involves solely the interpretation and application of a state tax statute to the facts as found by the state courts. Both the Circuit Court[1] and the Supreme Court of Alabama[2] held that this case is controlled by the deci-

[1] Appendix E to Petition at 50.

[2] 123 So. 2d at 178, Appendix A to Petition at 38.

sion in *State v. Plantation Pipe Line Co.*, 265 Ala. 69, 89 So. 2d 549 (1956), as to which this Court denied certiorari.[3]

This case presents no substantial federal question, and this Court need go no further than to scan the clear and short opinion of the Supreme Court of Alabama to see this. Accordingly, this reply will deal very briefly with the statement and arguments of the petitioner herein.

OPINION BELOW.

The opinion of the Alabama Supreme Court is unofficially reported at 123 So. 2d 172.

PETITIONER'S STATEMENTS OF JURISDICTION AND OF THE QUESTIONS PRESENTED ARE NOT ACCURATE.

Although not an appeal case, the petition purports to state a case of constitutional jurisdiction on the ground that "the validity of a state statute . . . has been drawn in question on the grounds that as so applied it is unconstitutional . . . ."[4]

The decision below is not a holding that the state statute is invalid, if such is the meaning of this statement, and the petition's statements as to the questions presented are likewise inaccurate.

QUESTIONS PRESENTED.

The Alabama Supreme Court accurately and succinctly stated the three questions presented to it as follows:

> "1. Does The Alabama Foreign Corporation Franchise Tax apply to a foreign corporation engaged solely in *interstate* commerce in Alabama?

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[3] State v. Plantation Pipe Line Co., 352 U. S. 943 (1956).

[4] Petition at 2.

"2. If the tax is applicable to a foreign corporation doing solely an interstate business in this state, is it violative of the commerce clause of the Federal constitution?

"3. Was Transcontinental Gas engaged solely in interstate commerce in Alabama in 1956?"[5]

As to the first question, it held:

"The first of these questions has been answered in the negative in *State v. Plantation Pipe Line Company*, 265 Ala. 69, 89 So. 2d 549, where this court after reviewing the history of the Foreign Corporation Franchise Tax law of this state held:

> "'The Alabama franchise tax on foreign corporations is not applicable to foreign corporations doing an exclusively interstate business in Alabama.'"[6]

As to the second question, its only comment, which immediately followed the last quotation, was:

"There is no occasion, then, to consider anew the second question outlined above. It, too, has been answered in the *Plantation* case, *supra*."[7]

As to the third question, it held:

"We are of the opinion that the facts of this case indicate that appellee was engaged exclusively in interstate commerce in Alabama in 1956.—*Spector Motor Service, Inc., v. O'Connor*, 340 U. S. 602, 95 L. Ed. 573; *Ozark Pipe Line Corporation v. Monier*, 266 U. S. 555, 69 L. Ed. 439; *United Air Lines, Inc., v. Joseph*, 282

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[5] 123 So. 2d at 175, Appendix A to Petition at 32.

[6] 123 So. 2d at 175, Appendix A to Petition at 32.

[7] 123 So. 2d at 175, Appendix A to Petition at 32.

App. Div. 48, 121 N. Y. Supp. 2d 692, aff'd 307 N. Y. 762, 121 N. E. 2d 557.

"We find no controlling difference between the facts here and the facts of the *Plantation* case, *supra*, decided by this court in 1956. We entertain the view, therefore, that the decision of the trial court was correct."[8]

On the issues presented, it is clear that the holdings with respect to the first and third questions effectively disposed of the entire case.

The Alabama Supreme Court did not announce a holding with respect to the second question; it merely stated that "[t]here is no occasion, then, to consider anew the second question outlined above."[9] This was appropriate in light of its previous holding on the first question. The reference to *State v. Plantation Pipe Line Co.*, 265 Ala. 69, 89 So. 2d 549 (1956), where it was held that "[t]he Alabama franchise tax if applicable to a foreign corporation engaging exclusively in interstate commerce in Alabama would be unconstitutional"[10] does not constitute a holding on the question. It is clear that the Alabama Supreme Court dealt with the constitutional question only hypothetically and in passing, and independently of the other questions. The decision of the second question was not required for and is not a basis of, the disposition of this case by the Alabama Supreme Court. This is made apparent by Mr. Justice Lawson's concurring remarks in the *Plantation* case:

". . . . Since the Court holds those statutes to be applicable only to intrastate business and that the taxpayer is engaged exclusively in interstate business,

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[8] 123 So. 2d at 178, Appendix A to Petition at 38.

[9] 123 So. 2d at 175, Appendix A to Petition at 32.

[10] 265 Ala. at 80, 89 So. 2d at 562.

there is no occasion to write to the constitutional question . . . ."[11]

There is, thus, no question in this case properly cognizable by this Court.

STATEMENT OF FACTS.

Petitioner's statement of facts is argumentative, misleading and omissive. Since the responsibility for reviewing the facts found is not a function of this Court in this case, since the trial court made detailed findings of fact[12], and since the Alabama Supreme Court, accepting the determination of the trial court, accurately summarized the facts,[13] no additional statement is here attempted.

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[11] 265 Ala. at 92, 89 So. 2d at 569

[12] Appendix E to Petition at 43-58

[13] Appendix A to Petition at 26-31

ARGUMENT.

In *State v. Plantation Pipe Line Co.*, 265 Ala. 69, 89 So. 2d 549 (1956), the Alabama Supreme Court considered, with respect to Plantation, the identical questions presented in this case with respect to respondent. The *Plantation* decision, as does the instant decision, rejected the arguments of petitioner. In the *Plantation* case the State filed a petition for writ of certiorari in this Court, which was denied. *State v. Plantation Pipe Line Co.*, 352 U. S. 943 (1956). The instant case, thus, represents an attempt on the part of petitioner to relitigate issues previously decided.

The sole basis for this petition is the attempt on the part of petitioner to have this Court undertake to review the decision of the Alabama Supreme Court construing the Alabama foreign corporation franchise tax and applying it to the particular facts of the respondent's business as found by the courts below.

The State would have this Court review the findings of both the Alabama Supreme Court and the trial court that respondent was engaged only in interstate commerce in Alabama. This is basically a determination of fact. If this finding were made the basis of a holding necessary to the ultimate decision, that the state statute was applicable and, as so applied, inhibited by the Commerce Clause, it would be subject to independent review by this Court as a necessary part of its determination of a properly presented federal question. But the finding below as to the nature of respondent's business was made by both the Alabama Supreme Court and the trial court as an inherent part of, and basis for, the construction and application of the state statute, and whether it was right or wrong is of no concern to this Court.

In *State Tax Commission v. Van Cott*, 306 U. S. 511 (1939), this Court said:

> " . . . . If the Court were only incidentally referring to decisions of this Court in determining the meaning of the State law, and had concluded therefrom that *the statute was itself intended to grant exemption to respondent*, this Court would have no jurisdiction to review that question.[14] (Emphasis added.)

That is exactly the situation here.

In any event the unanimous conclusion of the state judges, who considered the undisputed facts of record here, that respondent was not engaged in intrastate business within the intent of the state statute, is so clearly correct as to be beyond reasonable debate.

Respondent sold gas in Alabama only to 13 municipal corporations. As stated by the Alabama Supreme Court:

> "The gas purchased in 1956 by each municipal corporation in Alabama was purchased primarily for resale with small quantities of it being used and consumed by each purchaser. No municipal corporation used more than 2% of the gas purchased."[15]

In *State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc.*, 284 U. S. 41 (1931), this Court held that a natural gas company engaged in transporting, selling and delivering gas to local distributing companies for resale was engaged in interstate commerce. The authority of this case has never been questioned, and its holding has frequently been affirmed. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498 (1942); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507 (1947). In the last cited case this Court said:

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[14] 306 U. S. at 514.

[15] 123 So. 2d at 174, Appendix A to Petition at 29.

> "Thus gas furnished to local utilities for resale is supplied unquestionably, both as to transportation and as to sale, in interstate commerce."[16]

The fact that the municipal corporations to whom respondent sold gas used or consumed small quantities does not prevent this case from being controlled by *State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc., supra.*

Even if all the gas were used or consumed by the purchasers, its transportation, sale and delivery was still in interstate commerce. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra*; *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill. 2d 468, 123 N. E. 2d 503 (1955), *cert. den.*, 349 U. S. 935 (1955); *Texas Gas Transmission Corp. v. Atkins*, 197 Tenn. 123, 270 S. W. 2d 384 (1954), *cert. den.*, 348 U. S. 883 (1954), and *Gay v. United Gas Pipe Line Co.*, 159 Fla. 659, 32 So. 2d 600 (1947).

The primary thrust of petitioner's argument, that respondent was engaged in intrastate commerce in Alabama, is that respondent not only transported the gas but also sold it. Petitioner, however, does not cite a single case from this or any other court to support this unique thesis. Both the Alabama Supreme Court and the trial court considered and rejected the identical argument. The Alabama Supreme Court said:

> ". . . . The trial court was of the opinion, and we are agreed, that commerce is not limited to transportation. In the language of the trial court: 'Persons transporting their own product, gas, which they sell, can be, and are, engaged exclusively in interstate commerce' . . . ."[17]

This conclusion is so plainly sound that citation of authority is a waste of time; however, the following cases

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[16] 332 U. S. at 513.

[17] 123 So. 2d at 177, Appendix A to Petition at 37.

inter alia, hold that gas companies which transported natural gas owned by them, which sold the gas to local utilities for resale and to industrial users for consumption, and which delivered the gas at reduced pressure to the purchasers, were engaged in interstate commerce: *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra; Mississippi River Fuel Corp. v. Hoffman, supra; Texas Gas Transmission Corp. v. Atkins, supra;* and *Gay v. United Gas Pipe Line Co., supra.*

Petitioner suggests that *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465 (1931), and *Southern Natural Gas Corp. v. State*, 301 U. S. 148 (1937), compel the conclusion that respondent was engaged in intrastate commerce in Alabama. An examination of these cases reveals not only that they are factually inapplicable to this case but also that there is grave doubt as to their present validity.

In the *East Ohio* case this Court held that East Ohio was engaged in intrastate commerce. The following facts were present in that case but are not present in the instant case:

1. Some of the gas sold in Ohio by the gas company was produced by it in Ohio.

2. The gas company was engaged in the business of furnishing natural gas under local franchises.

3. The gas company's mains extended to the premises of the ultimate consumers, including homeowners, in more than 50 municipalities in Ohio.

4. The gas company delivered the gas at burner tip pressure.

In the *Southern Natural* case this Court held that the gas company was engaged in intrastate commerce. Two facts were present in that case but not in the instant case:

1. Southern Natural reduced the pressure at the point of delivery for the accommodation of the purchaser to meet its needs and requirements.

2. Southern Natural agreed to establish the requisite service lines running to the described plants in order that the gas might be furnished in a manner suited to the consumer's needs.

These distinctions are obviously pertinent. The *East Ohio* case was distinguished in *Memphis Natural Gas Co. v. McCauless*, 180 Tenn. 688, 177 S. W. 2d 841 (1944), *cert. den.*, 323 U. S. 785 (1944), and *Texas Gas Transmission Corp. v. Atkins*, 197 Tenn. 123, 270 S. W. 2d 384 (1954), *cert. den.*, 348 U. S. 883 (1954), on the ground that "the distribution of gas through service pipes in a particular locality and sale at the burner tips was intrastate commerce."[18] *Sinclair Pipe Line Co. v. Carpentier*, 10 Ill. 2d 300, 140 N. E. 2d 115 (1957), distinguished the *Southern Natural* case on the ground that Southern Natural engaged in local activities "by reducing the pressure of the gas at the point of delivery to meet the needs and requirements of local purchasers and by establishing local lines for their convenience."[19] The *Southern Natural* case was likewise distinguished in *Memphis Natural Gas Co. v. McCauless*, *supra*, on the ground that Southern Natural had service pipes running to the premises of the consumer.

It is extremely doubtful that the holding in the *East Ohio* case has any present validity. This Court characterized the test employed in the *East Ohio* case for determining when interstate commerce ended and intrastate commerce began as "n chanical" in *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, *supra*, and held in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, *supra*, that such mechanical considerations are no longer effective, if ever they were exclusively. In the last cited case gas was sold to an industrial con-

[18] 177 S. W. 2d at 843, 270 S. W. 2d at 386.

[19] 140 N. E. 2d at 122.

sumer and the pressure reduced before delivery. Yet, this Court held that such sale was in interstate commerce.

While recognizing that the Federal Natural Gas Act, 15 U. S. C., § 717, et seq., is a regulatory law and that "[i]t is doubtful that it applies to taxation at all",[20] petitioner discusses that act and various decisions rendered thereunder. Petitioner points out that Congress gave the Federal Power Commission power over rates and other aspects of sales of gas by interstate pipelines to purchasers for resale and that Congress refrained from giving the Federal Power Commission power to regulate the rates of gas sold by interstate pipelines to customers for their own use. Petitioner then indirectly and incorrectly suggests that, therefore, sales to customers for their own use are intrastate sales. A similar suggestion was flatly rejected in *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill. 2d 468; 123 N. E. 2d 503 (1955), *cert. den.*, 349 U. S. 935 (1955), where the Illinois Supreme Court said:

> " . . . . But this statutory distinction which Congress elected to make certainly did not mean, as appellants seem to deduce, that the sales for resale were sales in interstate commerce while the sales to industries for their own use were not. . . . "[21]

This court, moreover, held in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, *supra*, that the sales to industrial consumers were sales in interstate commerce. This case and others cited by petitioner do not hold, as implied by petitioner, that the sales here involved were not in interstate commerce.

In addition, petitioner's argument assumes that the sales involved in the instant case were sales for consumption. As previously shown, the sales were primarily for

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[20] Petition at 10.

[21] 123 N. E. 2d at 507.

resale and the purchasers used or consumed small quantities of the gas, no purchaser using more than 2% of the gas purchased.

The above cases demonstrate that the unanimous conclusion of the state judges below, who considered the undisputed facts of record here, that respondent was not engaged in intrastate business within the scope of the state statute, is clearly correct. This conclusion is not in conflict with any decision of this Court, or with any comparable decision of any other court, either federal or state.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

SAMUEL M. JOHNSTON,
P. O. Box 550,
Mobile 4, Alabama.

JOS. F. JOHNSTON,
E. T. BROWN, JR.,
902 First National Building,
Birmingham 3, Alabama.
Counsel for Respondent.

JOHNSTON, McCALL & JOHNSTON,
P. O. Box 550,
Mobile 4, Alabama.
CABANISS & JOHNSTON,
902 First National Building,
Birmingham 3, Alabama.
Of Counsel.

Certificate of Service.

I, Jos. F. Johnston, one of the attorneys for Transcontinental Gas Pipe Line Corporation, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ... day of December, 1960, I served copies of the foregoing Brief for Respondent in Opposition on the State of Alabama, petitioner herein, by mailing copies in duly addressed envelopes, with first class postage prepaid, to its respective attorneys of record as follows:

MacDonald Gallion, Attorney General for Alabama, Montgomery, Alabama;

Guy Sparks, Executive Assistant to the Commissioner of Revenue, and Special Assistant Attorney General, State Department of Revenue, Montgomery, Alabama;

William H. Burton, Counsel, Revenue Department, and Assistant Attorney General, State Department of Revenue, Montgomery, Alabama.

.....

902 First National Building,
Birmingham 3, Alabama,
Attorney for Respondent.